United Malayan Insurance Bhd v Ng Chai Khoon Paul

HIGH COURT (KUALA LUMPUR) — SUIT NO C3–23–3888–86
ZAKARIA YATIM J
29 MAY 1992

Agency *— Del credere agent — Meaning of — Whether defendant was del credere agent — Absence of consideration in form of higher commission — Liable only if third party actually failed to pay and the sum is certain or ascertained*

Evidence *— Parol evidence rule — Exception — Failure of consideration — Proof of fact invalidating document — Evidence Act 1950 s 92 proviso (a)*

Words and Phrases *— 'Del credere agent'*

The plaintiffs appointed the defendant as their agent in soliciting insurance business written by them. Under cl 8(a) of the agency agreement, the defendant was required to promptly collect all premia due on policies issued under the agency and would be liable to the plaintiffs for the settlement of the balance due irrespective of whether payments had in fact been received by the defendant or not. The plaintiffs alleged that as at 30 September 1986, the defendant owed the plaintiffs the outstanding sum of $117,339.21, and demanded payment of the said sum. The plaintiffs claimed that the defendant was a del credere agent. However, the plaintiffs did not deny the defendant's averments in the various affidavits that he was not paid a higher commission. The plaintiffs also did not deny that there was no consideration (in the form of a higher commission) for any obligation by the defendant under cl 8 of the agency agreement which stated that he would be liable to the plaintiffs irrespective of whether any premia from policies issued under the agency agreement had been collected. Neither did the plaintiffs reply to the defendant's explanation on how his remuneration was computed.

Held, dismissing the claim:

(1) As the plaintiffs did not assert that the defendant was paid a higher or additional commission, and in the absence of any reply by the plaintiffs to the defendant's averments on the computation of his salary, the said averments were considered by the court to have been accepted by the plaintiffs. The court therefore found that the defendant did not receive a higher commission under the agency agreement and was not a del credere agent.

(2) Despite cl 8(a) of the agreement, there was no consideration for such an obligation as averred to in the defendant's affidavit. Although under s 92 of the Evidence Act 1950, no other evidence is allowed to contradict or vary the terms of a contract which have been reduced to the form of a document, proviso (a) to that section allows proof of any fact invalidating the document such as failure of consideration.

(3) A del credere agent is liable only if the third party actually failed to pay the premium and if the sum of money is certain or ascertained. In this case, neither the statement of account nor the plaintiffs' affidavit showed that the various insureds failed to pay the premia. Further, as it was not clear when the defendant's agency was terminated, the amount claimed by the plaintiffs therefore could not be said to be certain or ascertained.

[Bahasa Malaysia summary

Plaintif telah melantik defendan sebagai ejen mereka untuk memperoleh perniagaan insuran yang ditulis oleh mereka. Di bawah fasal 8(1) perjanjian ejensi itu, defendan dikehendaki mengutip dengan segera semua premium yang kena dibayar atas polisi yang dikeluarkan di bawah ejensi itu dan akan bertanggungan kepada plaintif untuk penyelesaian baki yang kena dibayar tidak kira sama ada bayaran sebenarnya telah diterima oleh defendan atau tidak. Plaintif mendakwa bahawa pada 30 September 1986, defendan terhutang kepada plaintif sejumlah yang belum dijelaskan sebanyak $117,339.21, dan menuntut pembayaran jumlah itu. Plaintif mendakwa yang defendan adalah seorang ejen del credere. Namun demikian. plaintif tidak menafikan pengesahan defendan dalam berbagai afidavit bahawa beliau tidak dibayar komisyen yang lebih tinggi. Plaintif juga tidak menafikan bahawa tidak ada balasan (dalam bentuk komisyen yang lebih tinggi) untuk sebarang obligasi oleh defendan di bawah fasal 8 perjanjian ejensi itu yang menyatakan bahawa beliau akan bertanggungan kepada plaintif tidak kira sama ada sebarang premium atas polisi yang dikeluarkan di bawah perjanjian ejensi itu telah dikutip. Begitu juga, plaintif tidak menjawab kepada penerangan defendan tentang cara upahnya dikira.

Diputuskan, menolak tuntutan itu:

(1) Oleh kerana plaintif tidak menekankan bahawa defendan dibayar komisyen tambahan atau yang lebih tinggi, dan tanpa jawapan plaintif kepada pengesahan defendan tentang pengiraan gajinya, pengesahan tersebut dikira oleh mahkamah sebagai telah diterima oleh plaintif. Mahkamah, lantaran itu, mendapati bahawa defendan tidak menerima komisyen yang lebih tinggi di bawah perjanjian ejensi itu dan bukanlah seorang ejen del credere.

(2) Tidak kira fasal 8(a) perjanjian itu, tidak ada balasan untuk obligasi sedemikian seperti yang diesahkan di dalam afidavit defendan. Walaupun di bawah s 92 Akta Keterangan 1950, tiada keterangan dibenarkan menyangkal atau mengubah terma sesuatu kontrak yang telah ditulis di dalam bentuk dokumen, proviso (a) kepada seksyen itu membenarkan pembuktian sebarang fakta yang membatalkan dokumen itu seperti ketiadaan balasan.

(3) Seorang ejen del credere cuma bertanggungan jika pihak ketiga sebenarnya gagal membayar premium itu dan jika jumlah wang

A itu adalah tertentu atau telah ditentukan. Dalam kes ini kenyataan akaun dan afidavit plaintif tidak menunjukkan bahawa berbagai orang yang diinsurankan itu telah gagal membayar premium. Selanjutnya, oleh kerana ianya tidak jelas bila ejensi defendan telah ditamatkan, jumlah yang dituntut oleh plaintif lantaran itu
B tidak boleh dikatakan satu jumlah tertentu atau yang telah ditentukan.]

[*Editorial Note*: The plaintiffs have appealed to the Supreme Court vide Civil Appeal No 03–124–91.]

C **Cases referred to**

1 *Royal Insurance Group v David* [1976] 1 MLJ 128 (folld)
2 *JM Wotherspoon & Co Ltd v Henry Agency House* [1962] MLJ 86 (folld)
3 *Alloy Automotive Sdn Bhd v Perusahaan Ironfield Sdn Bhd* [1986] 1 MLJ 382 (refd)
D 4 *Thomas Gabriel & Sons v Churchill & Sim* [1914] 3 KB 1272 (folld)

Legislation referred to

Evidence Act 1950 s 92 proviso (a)

E *Leow Chai Fah* (*Leow & Associates*) for the plaintiffs.
BE Teh (*Teh & Associates*) for the defendant.

Zakaria Yatim J: This is an appeal by the defendant against the decision of the senior assistant registrar given on 27 October 1987 allowing the
F plaintiffs' application to sign final judgment against the defendant.

After considering the evidence and the arguments of both counsel for the plaintiffs and the defendant, I allowed the appeal with costs. On the application of counsel for the plaintiffs, I adjourned the matter into open court for further argument.

According to the statement of claim, an agency agreement was entered
G into between the plaintiffs and the defendant on 26 September 1985. By this agreement, the plaintiffs appointed the defendant as agent of the plaintiffs to represent the plaintiffs in the soliciting of the various classes of general insurance business written by the plaintiffs. Under the agency agreement, the defendant was required to promptly collect all premia due
H on policies issued under the agency and would be liable to the plaintiffs for the settlement of the balance due under the said agency agreement irrespective of whether payments had in fact been received by the defendant or not. The plaintiffs alleged that it had rendered monthly statements of account to the defendant, and as at 30 September 1986, the defendant owed the plaintiffs the outstanding sum of $117,339.21. The plaintiffs demanded
I payment of the said sum but the defendant failed to pay the said sum or any part thereof.

No statement of defence was filed by the defendant.

The plaintiffs' claim purported to be on the basis that the defendant was a del credere agent. Mr BE Teh, counsel for the defendant submitted that the defendant was not a del credere agent because there was no evidence that the defendant was paid a higher commission.

In order to determine this question, it is necessary to examine the agency agreement. Clause 8(a) of the agreement states:

> The agent shall promptly collect all premiums due on the policies issued under their agency and shall be liable to the company for the settlement of the balance due under this agreement irrespective of whether payments have in fact been received by them or not.

Clause 9(a) provides:

> The company shall allow to the agent, commissions for the policies issued under their agency and other allowances if any agreed, at the rates set out in the attached schedule of commission.

The schedule sets out the terms of the commission allowed by the plaintiffs in respect of the various policies stated therein.

The question now is whether the defendant was a del credere agent under the agency agreement. In *Royal Insurance Group v David,*[1] the Federal Court, at p 129, defined a del credere agent as a

> ... mercantile agent who, in consideration of extra remuneration, called a del credere commission, guarantees to his principal that third persons with whom he enters into contract ... shall duly pay any sums becoming due under those contracts.

In *JM Wotherspoon & Co Ltd v Henry Agency House,*[2] Suffian J, as he then was said, at p 87, that:

> ... it is quite clear that to constitute a del credere agency not only is it necessary for a commission to have been paid by the plaintiff to the defendant, but an additional commission should also have been paid.

The defendant, in his affidavit affirmed on 14 August 1987, denied that he was paid a higher commission under cl 8 of the agency agreement. In that affidavit, he averred in para 3(i), (ii) and (vii) as follows:

> (i) I was in the employment [sic] of the plaintiff company since 1973. I left the employment of the plaintiff company in March 1986.
> (ii) In 1985, the plaintiff company merged with one East West Insurance Co Bhd. Prior to such merger ... .
> (vii) I further state that there was no consideration (in the form of higher commission) for any obligation under cl 8 of the agency agreement, to be responsible for premium collection. As such I say that I am not a del credere agent of the company and consequently not liable to the plaintiff for such premium, if any, which is denied, which has not been paid by the insured.

The averments in the above paragraph had not been denied by the plaintiffs. Indeed, Mr Kang Hak Kooi, in his affidavit affirmed on 19 August

1987 on behalf of the plaintiff, said at para 7 that '... the question of want of consideration in the form of higher commissions as alleged does not arise ...'.

In a subsequent affidavit affirmed on 23 October 1987, the defendant explained how his remuneration was computed. In paras 2 and 3 of that affidavit, he averred:

> 2 Referring to para 4 of the affidavit, I reiterate that the sum of $40,066.29 appearing in the statement of accounts as at 30 November 1985 is the aggregate of premium collectible by the plaintiff in respect of policies issued prior to the agency agreement.
>
> Prior to the merger of East West and United Malayan Insurance Co Bhd and prior to the agency agreement, I enjoyed an overriding commission on policies issued under my account (not as a del credere agent) whether the policy was canvassed by me or others under my charge.
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> In fact, my salary was based on yearly premium collection. I was paid as salary an average of 4% of net annual premium collected. This practice was observed even after the so-called agency agreement purported to constitute me a del credere agent. In truth and in fact, I did not receive any commission at all not to say a higher rate of commission. My salary was still based on the formula aforesaid. In truth and in fact, no commission was ever paid to me: such items only appear in the accounts kept by the plaintiff as book entries.
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> 3 In reply to para 5 of the said affidavit, I state that after my letter of resignation dated 1 April 1986, I only went to the plaintiff's office occasionally. I did no work, nor did I canvass or solicit any insurance business for the plaintiff. As for the policies renewed either at the instance of the plaintiff or the insureds, I state that there ought not to be part of the plaintiff's claim.
>
> I further state that there can be no renewal of a policy, automatically as contended for by the plaintiff.
>
> I reiterate that after March 1986, the plaintiff knowing full well of my imminent departure, arbitrarily and improperly debited my account for various policies, whether new or renewed policies.

The above averments were also not controverted by the plaintiffs. I have read the plaintiffs' affidavits and I agree with Mr BE Teh that the plaintiffs did not assert that the defendant was paid a higher or additional commission. In the absence of any reply to the defendant's above averments, I consider that the said averments were accepted by the plaintiffs (see *Alloy Automotive Sdn Bhd v Perusahaan Ironfield Sdn Bhd*[3]).

It is therefore my finding that the defendant did not receive a higher commission under the agency agreement. My finding is not inconsistent with cl g(a) of the agreement where it merely refers to commissions and not higher commissions. The schedule to the agreement contains the terms of the commission but it does not refer to a higher or additional commission.

In the circumstances, the defendant was not a del credere agent at the material time.

If the defendant was not a del credere agent, was he liable to pay the plaintiffs premia which were not received by him as provided in cl 8(c) of the agency agreement? In the *Royal Insurance*'s case,[1] the Federal Court

decided that a del credere agent was liable irrespective of whether or not he had collected the premia from the persons to whom the policies were issued through his agent. The defendant, in his affidavit, quoted the above and said that there was no consideration for his obligation under cl 8 of the agency agreement.

In my opinion, the plaintiffs are not entitled to claim from the defendant any premium which had not been received by the defendant. Although cl 8(a) states that the defendant was liable to pay such premium, I agree with the defendant's contention that there was no consideration for such obligation under cl 8. It is true that under s 92 of the Evidence Act 1950, when the terms of a contract have been reduced to the form of a document, no other evidence is allowed to contradict or vary the terms of the contract. But proviso (a) to that section states that 'any fact may be proved which would invalidate any document or which would entitle any person to any decree or order relating thereto, such as ... want or failure of consideration ...'.

If I am wrong in holding that cl 8(a) is bad for want of consideration, and assuming that the defendant was a del credere agent, the next question to consider is whether the plaintiffs are entitled to claim from the defendant the amount as prayed in the statement of claim.

A del credere agent would only be liable if the third party actually failed to pay the premium and if the sum of money is certain or ascertained. In *Thomas Gabriel & Sons v Churchill & Sim,*[4] Buckley LJ in his judgment, at p 1279, said:

> The liability of the del credere agent is a contingent pecuniary liability, not a liability to perform the contract; it is a pecuniary liability to make good in an event the default of the buyer in respect of a pecuniary liability. It does not extend to other obligations of the contract. It does not expose the del credere agent to an action to ascertain the sum due. It is limited to a contingent pecuniary liability in respect of a sum which, as between the seller and the buyer, is an ascertained sum.

Fridman's Law of Agency (3rd Ed) at p 29 states: 'The agent's liability only extended to a liability to pay the price of the goods (if certain or ascertained) on default or insolvency of the buyer.'

The amount claimed by the plaintiffs is based on the plaintiffs' statement of account exhibited to the plaintiffs' affidavit in support of its application for summary judgment. Neither the statement of account nor the plaintiffs' affidavit shows that the various insureds failed to pay the premia.

The next question is whether the amount claimed is certain or ascertained.

As already stated, the plaintiffs' claim was based on the agency agreement. The agency agreement was entered into on 26 September 1985. Under cl 15(c) of the agreement, the defendant's liability to pay the plaintiffs in respect of premia due on policies issued under the agreement commenced on 1 October 1985 and would continue indefinitely until the agreement was terminated by one of the parties. The plaintiffs' statement of account shows that as at 31 October 1986, the amount due for the plaintiffs was $117,239.93.

The defendant, in his affidavit affirmed on 14 August 1987, disputed any liability to the plaintiffs in respect of policies issued since March 1986. He said that by that date, he was no longer in the employ of the plaintiffs and he did not canvass or solicit insurance business for the plaintiffs. In his letter to the plaintiffs dated 1 April 1986, the defendant wrote,

Mr Warrick Lim
General Manager
East West-United Malayan Insurance Co Bhd
15th Floor, Wisma Sime Darby
Jalan Raja Chulan
Kuala Lumpur

Dear Mr Lim,

Since my employment as marketing executive with United Malayan Insurance 14 years ago, I had determined to do my best for the company. Now I have proven my sincerity through the increase in premium income from the humble three hundred thousand dollars annually to the present around two million dollars annually. As you are well aware that after the merger of East West and UMI, the new management has adopted regulations that enforce unfavourable conditions on my clients and imposed an agency agreement on me. The latter implies that all the responsibilities of debt related to the business I generate will be solely borne by me. I am unhappy with the above mentioned new regulations. Several requests had been made to the present management to withdraw, but until now, the management has given no reply to my requests.

At present, I am being offered a post as marketing manager in another organization. Seeing no possible compromise with the management in this company, I have decided to accept the offer. Therefore, please regard this letter as a formal notice to take effect on 1 April 1986 indicating my termination service with United Malayan Insurance Co Bhd on 31 June 1986. This three months' notice is given to comply with my employment contract.

Thank you for your attention.

Yours faithfully,

Sgd/ Paul Ng

In its reply, the plaintiffs wrote to the defendant that the defendant's last date of employment with the plaintiff was 31 May 1986. The plaintiffs' letter is reproduced below:

Mr Paul Ng Chai Woon
40 Jalan SS22/3
Damansara Utama
Petaling Jaya.

Dear Mr Ng

Resignation

Your letters dated 1 April 1986 and 30 April 1986 on your resignation refers.

Since we are unable to accept your requests and our counter-proposals were unacceptable to you, we regret that we will have to accept your resignation.

However, we understand that you have already joined another company effective 1 June 1986. As such, your last date of employment with us will be 31 May 1986.

We take this opportunity to thank you for your services rendered and wish you all the best in your future endeavours.

Yours sincerely,

How Lian Koo
Deputy general manager.

cc: General manager
Financial controller
Manager, Marketing/RI/Broking.

Mr Kang Hak Koon, in his affidavit affirmed on 17 August 1987 on behalf of the plaintiffs, averred that the agency agreement was not terminated and the defendant continued to be liable to the plaintiffs under the agreement. In para 5 of the affidavit, he said:

> The agency agreement executed between the plaintiff and the defendant was never terminated despite the defendant's resignation from the plaintiff's employment. I verily believe that under the agency agreement the defendant is liable for the premiums as he is entitled to the commissions for the business secured. I verily believe that some of the business in his account was automatically renewed by the plaintiff when no specific instructions from the defendant or the insureds were received in relation to the relevant policies. In the event any policies were renewed the defendant was given the commissions credited to the defendant's account as shown in the statement of account. I verily believe that in the absence of any notice from the defendant the plaintiff treated the defendant's business as belonging to the defendant. I am unable to see how the plaintiff's treatment of the defendant's account in such circumstances may be described as improper or unlawful as alleged or at all and I therefore refute the said allegations.

It seems to me that when the plaintiffs wrote to the defendant informing him that his last date of employment with the plaintiffs was 31 May 1986, it was implicit that the plaintiffs were referring to the last date of employment under the agency agreement. If that was his last date of 'employment' under the terms of the agency agreement, then the defendant was not liable in respect of any premium issued after that date. There is no evidence that any notice pursuant to cl 15(b) was issued by either party.

It is therefore not clear to me when the defendant's agency was terminated. Different dates were given by both the defendant and the plaintiffs. The amount claimed by the plaintiffs cannot therefore be said to be certain or ascertained.

In the circumstances, the plaintiffs are not entitled to summary judgment on the ground that the amount claimed by the plaintiffs is not certain or ascertained.

For the reasons stated above, I confirm the order I made in chambers. The plaintiffs would pay the costs of further argument to the defendant.

Claim dismissed.

Reported by Teh Y-Lyn